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SIXTH COURT OF APPEALS
TEXARKANA, TEXAS
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No. 06-18-00090-CR

In the
Court of Appeals
For the
Sixth District of Texas
At Texarkana

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TEXARKANA, TEXAS
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No. 17-0683-K277
In the 277th District Court
Of Williamson County, Texas

———————♦———————

LARRY THOMAS CHAMBERS, JR.
Appellant
v.
THE STATE OF TEXAS
Appellee

———————♦———————

APPELLANT'S BRIEF

———————♦———————

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ORAL ARGUMENT REQUESTED

STATEMENT REGARDING ORAL ARGUMENT

Pursuant to Texas Rule of Appellate Procedure 9.4(g) and Texas Rule of Appellate Procedure 39.1, Appellant requests oral argument.

IDENTIFICATION OF THE PARTIES

Pursuant to Texas Rules of Appellate Procedure 38.1(a) and 38.2(a)(1)(A), a complete list of the names of all interested parties, and the names and addresses of all trial and appellate counsel, is provided below:

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Trial Judge:

The Honorable Stacey Mathews—Presiding Judge of the 277th District Court of Williamson County, Texas

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STATEMENT OF THE CASE

In the 277th District Court of Williamson County, Texas, in cause number 17-0683-K277, Appellant was charged by indictment with Possession of Controlled Substance, Penalty Group 1, four grams or more but less than 200 grams. (CR – 34). The cause was tried before a jury and the same returned a verdict of *guilty* on April 11, 2018. (CR – 115). Appellant elected to have the same jury assess punishment. Said jury assessed Appellant's punishment at twenty years' confinement in the Texas Department of Criminal Justice, Correctional Institutions Division (TDCJ). (CR – 126). Appellant timely filed written notice of appeal on May 7, 2018. (CR – 135).

STATEMENT OF FACTS

At approximately 10:45 PM, on April 1, 2017, Appellant was driving a black Ford truck on the frontage road of highway I-35 in Round Rock, Texas. (RR7 – 82). Sgt. Sam Connell ("Connell") of the Round Rock Police Department was patrolling the area and focused his attention on the black Ford truck that Appellant was driving because "it did not appear that there was a license plate attached to the rear of it." (RR7 – 77, 82-83); *see generally* TEX. TRANSP. CODE ANN. § 504.943 ("Operation

of Vehicle Without License Plate"); 43 TEX. ADMIN. CODE § 217.27(b)(1) (requiring that a vehicle display license plates at the front and rear).

Connell activated his emergency lights and initiated a traffic stop of said truck; Appellant pulled into the parking lot of a restaurant called the Sirloin Stockade, located adjacent to the I-35 access road. (RR7 – 83-85, 87). The Ford truck door opened, but Connell proceeded to command Appellant to stay in the vehicle; Connell and other officers, who had arrived on the scene, approached the Ford truck with firearms drawn and pointed at Appellant in what Connell termed to be "lethal coverage." (RR7 – 92, 96, 100, 102, 152). It was uncontested that the Ford truck was in fact exhibiting a license plate on the rear of the vehicle. (RR7 – 40). Other officers arrived on the scene. (RR7 – 149, 152, 180). Appellant cooperated with officers' instructions, exited the vehicle and got on the ground upon command by Connell, and was placed into handcuffs; he consented to a search of his person. (RR7 – 103, 158-160, 181).

Officer Ryan Wilson ("Wilson") testified that while searching Appellant's pocket, he felt a "gritty material" that he suspected was residue of methamphetamine; Officer Lauren Weaver ("Weaver") testified that, while looking into the Ford truck, she observed a baggie of drugs in the Ford truck in plain view. (RR7 – 160, 182). Sergeant Jeff Kopp ("Kopp") testified that several minutes into the investigation he heard a "crunching sound" under his feet; Kopp looked down

and discovered that he had accidentally stepped on a baggie of drugs lying on the ground of the parking lot. (RR7 – 149-150). This baggie—found on the parking lot pavement, approximately one or two feet away from the Ford truck—contained a larger amount of drugs than the baggie found in the vehicle. (RR7 – 114, 163). The narcotics found in the Ford truck tested positive for methamphetamine and weighed in at 1.35 grams, plus or minus 0.07 grams, according to forensic chemist Scott Ruplinger ("Ruplinger"). (RR7 – 114, 207); (SX11-12). The narcotics found on the parking lot pavement also tested positive for methamphetamine and weighed in at 4.07 grams, plus or minus 0.11 grams, according to Ruplinger. (RR7 – 114, 207); (SX11-12). Besides being on the pavement near the Ford truck, there was no evidence adduced at trial that Appellant ever intentionally or knowingly possessed the baggie of methamphetamine recovered from the ground.

In addition to the bag recovered from inside Appellant's truck, two handguns were also found in the vehicle. (RR7 – 161). Appellant was subsequently arrested and indicted for Possession of a Controlled Substance, Penalty Group 1, in an amount weighing four or more grams but less than 200 grams. (CR – 34).

At the punishment phase of trial, the jury learned that Appellant had no prior criminal history. (RR10 – 50). They also learned that Appellant was someone who had worked hard since he was seventeen years old, had served his county honorably for many years as a law enforcement officer, and had served his country honorably

for many years as a private contractor in Iraq in a military assistance role. (RR10 – 8, 10-11, 13, 22-23, 32). The jury also learned that, as the result of his service in Iraq, Appellant suffered from physical and mental health disabilities that led to a reliance on opioid prescription medication; they learned that Appellant's growing addiction to opioid medications, worsening over many years, led him down a spiral that eventually left Appellant homeless and prompted him to associate with others involved in drugs and criminal activity. (RR10 – 24-27, 32-33, 35, 40, 45, 71 104, 114).

At the punishment stage of trial, meanwhile, the State attempted to show the jury that, inter alia, Appellant sold guns over the years without a permit, used narcotics, did push-ups at the jail against regulations, and ate an extra brownie at the jail without permission. (RR8 – 54-60, 62-70, 95-112; RR10 – 136, 138). The State also put on evidence that attempted to link Appellant to the burglary of a residence, from which weapons were stolen, that occurred in the days before Appellant's arrest in the instant case. (RR8 – 143-67; 182-215; RR9 – 56-225).

SUMMARY OF THE ARGUMENT

First, there was legally insufficient evidence developed at trial to convict Appellant of Possession of Controlled Substance, in an of four grams or more but less than 200 grams, because the State failed to prove beyond a reasonable doubt

that Appellant intentionally or knowingly possessed the requisite amount of the controlled substance. Therefore, this Court should reverse Appellant's conviction and acquit Appellant of the same, or, in the alternative, reform the judgement to reflect a conviction for a lesser-included offense of Possession of Controlled Substance, in an amount weighing one gram or more but less than four grams, and remand the case back to the trial court for a new trial on punishment.

Second, the trial court reversibly erred when it overruled Appellant's motion to suppress evidence pursuant to Article 38.23 of the Texas Code of Criminal Procedure, given that Appellant was detained without reasonable suspicion and arrested without probable cause, in violation of the Fourth Amendment of the United States Constitution and Article 1, Section 9 of the Texas Constitution. Therefore, this Court should vacate Appellant's conviction and remand the case back to the trial court for a new trial on all stages.

Third, the trial court reversibly erred when it denied Appellant's request for a jury instruction pursuant to Article 38.23 of the Texas Code of Criminal Procedure during the guilt/innocence stage of trial, and Appellant suffered some harm as a result of said error. Therefore, this Court should vacate Appellant's conviction and remand the case back to the trial court for a new trial on all stages.

Fourth, Appellant's twenty-year prison sentence violates the prohibitions against cruel and unusual punishment in the Eighth Amendment to the United States

Constitution and Article 1, Section 13 of the Texas Constitution. Therefore, this should Court vacate the trial court's sentence and remand the case back to the trial court for a new trial on punishment.

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APPELLANT'S FIRST POINT OF ERROR

The Evidence is Legally Insufficient to Support Appellant's Conviction of Possession of Controlled Substance, Four Grams or more but less than 200 Grams, because the State Failed to Prove Beyond a Reasonable Doubt that Appellant Intentionally or Knowingly Possessed Four Grams or More of a Controlled Substance

Due process requires that the State prove every element of the charged crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 313 (1979); *Byrd v. State*, 336 S.W.3d 242, 246 (Tex. Crim. App. 2011). When reviewing the sufficiency of the evidence to support a conviction, courts consider all of the evidence in the light most favorable to the verdict to determine whether any rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt. *Jackson*, 443 U.S. at 319; *Brooks v. State*, 323 S.W.3d 893, 899 (Tex. Crim. App. 2010). In determining the legal sufficiency of the evidence, courts must consider all the evidence in the record: both direct and circumstantial evidence, properly or improperly admitted evidence, and evidence submitted by either the prosecution or the defense. *Clayton v. State*, 235 S.W.3d 772, 778 (Tex. Crim. App. 2007); *Allen v. State*, 249 S.W.3d 680, 688-89 (Tex. App.—Austin 2008, no pet.).

Courts review all the evidence in the light most favorable to the verdict and assume that the trier of fact resolved conflicts in the testimony, weighed the evidence, and drew reasonable inferences in a manner that supports the verdict. *Jackson*, 443 U.S. at 318; *Laster v. State*, 275 S.W.3d 512, 517 (Tex. Crim. App. 2009).

A legal-sufficiency review requires an appellate court to defer to the jury's determinations of the witnesses' credibility and the weight to be given their testimony. *Brooks*, 323 S.W.3d at 899. The jury, as exclusive judge of the facts, is entitled to weigh and resolve conflicts in the evidence and draw reasonable inferences therefrom. *Clayton*, 235 S.W.3d at 778. In assessing the legal sufficiency of the evidence, courts have a duty to ensure that the evidence presented actually supports a conclusion that the defendant committed the charged crime. *Williams v. State*, 235 S.W.3d 742, 750 (Tex. Crim. App. 2007); *see Winfrey v. State*, 323 S.W.3d 875, 882 (Tex. Crim. App. 2010). If an appellate court determines that the accused's conviction is not supported by legally-sufficient evidence, the court must render judgment acquitting the accused of the offense. *See, e.g., Berry v. State*, 424 S.W.3d 579, 587 (Tex. Crim. App. 2014).

In this case, in order to achieve a conviction on the second-degree felony offense of Possession of a Controlled Substance as charged in the Indictment, the State was required to prove beyond a reasonable doubt that on or about April 2, 2017, Appellant intentionally or knowingly possessed a controlled substance,

methamphetamine, in the amount of four grams or more but less than 200 grams. (CR – 34, 109-114); *see* TEX. HEALTH & SAFETY CODE ANN. § 481.115(a); TEX. HEALTH & SAFETY CODE ANN. § 481.115(d). The State failed to adduce legally-sufficient evidence at trial that proved beyond a reasonable doubt that Appellant possesses methamphetamine in the amount of four grams or more but less than 200 grams.

To prove unlawful possession of a controlled substance, "the State must prove that: (1) the accused exercised control, management, or care over the substance; and (2) the accused knew the matter possessed was contraband." *Evans v. State*, 202 S.W.3d 158, 161 (Tex. Crim. App. 2006); *see also* TEX. HEALTH & SAFETY CODE ANN. § 481.002(38) ("'Possession' means actual care, custody, control, or management."). Possession need not be exclusive. *Evans*, 202 S.W.3d at 162. But when the accused is not in exclusive possession of the place where the controlled substance is found, then additional, independent facts and circumstances must affirmatively link the accused to the substance in such a way that it can reasonably be concluded that the accused possessed the substance and had knowledge of it. *Poindexter v. State*, 153 S.W.3d 402, 406 (Tex. Crim. App. 2005). In other words, whether direct or circumstantial, the evidence must establish that the accused's connection with the contraband was more than just fortuitous. *Brown v. State*, 911 S.W.2d 744, 747 (Tex. Crim. App. 1995).

Links that may circumstantially establish the sufficiency of the evidence to prove knowing possession include: (1) the defendant's presence when a search is conducted; (2) whether the substance was in plain view; (3) the defendant's proximity to and the accessibility of the substance; (4) whether the defendant was under the influence of narcotics when arrested; (5) whether the defendant possessed other contraband or narcotics when arrested; (6) whether the defendant made incriminating statements when arrested; (7) whether the defendant attempted to flee; (8) whether the defendant made furtive gestures; (9) whether there was an odor of contraband; (10) whether other contraband or drug paraphernalia were present; (11) whether the defendant owned or had the right to possess the place where the substance was found; (12) whether the place where the substance was found was enclosed; (13) whether the defendant was found with a large amount of cash; and (14) whether the conduct of the defendant indicated a consciousness of guilt. *Evans*, 202 S.W.3d at 162; *Jones v. State*, 963 S.W.2d 826, 830 (Tex. App.—Texarkana 1998, pet. ref'd). Whether sufficient facts and circumstances exist to affirmatively link a defendant to illegal contraband is determined on a case-by-case basis. *Allen v. State*, 249 S.W.3d 680, 692 n.13 (Tex. App.—Austin 2008, no pet.).

Here, the State presented evidence that the police found two main baggies of drugs at the scene. (RR7 – 114, 160-162). The first baggie of methamphetamine was discovered in the Ford truck Appellant was driving; said methamphetamine

weighed less than four grams, specifically 1.35 grams. (RR7 – 114, 160-62, 207); (SX11-12). The only evidence adduced at trial that Appellant intentionally or knowingly possessed the methamphetamine in the truck was: (1) Appellant was driving the Ford truck alone in the moments before the truck was pulled over, (2) the methamphetamine was found on in truck near where Appellant was sitting, and (3) a small amount of lose, "gritty material" was found in the pocket of the coat that Appellant was wearing and Wilson, a police officer in training, suspected the substance could be methamphetamine. (RR7 – 160, 179, 182); (SX5).

The facts of the instant case compare well to those in *Kyte v. State*, 944 S.W.2d 29 (Tex. App.—Texarkana 1997, no pet.). In *Kyte*, a police officer conducted a traffic stop for a traffic violation. *Kyte*, 944 S.W.2d at 32. Kyte was acting nervous and granted consent to search the vehicle; officers found cocaine under the carpet in center floorboard. *Id*. This Court reversed the conviction for Possession of a Controlled Substance due to legally insufficient evidence that Kyte intentionally or knowing possessed the cocaine. *Id*. at 33. In this case, as in *Kyte*, there was no evidence adduced that Appellant was the owner and sole operator of the vehicle beyond the few moments surrounding the traffic stop; there was no odor of drugs in the vehicle; there was no drug paraphernalia was found; Appellant did not engage in any conduct indicating a consciousness of guilt; there was no special relationship to the contraband; Appellant did not give conflicting statements about any relevant

matter; there was no evidence adduced that Appellant was under the influence of any contraband; and Appellant made no affirmative statements that connected him to the contraband. *See Kyte*, 944 S.W.2d at 33.

As the "gritty material" found by officer-in-training Wilson was not scientifically confirmed as contraband, the only significant distinguishing factor between *Kyte* and the instant case was that, here, Weaver discovered baggie of methamphetamine in the Ford truck without having to lift up any carpet, *Compare* (RR7 – 160, 167-168, 174-175) *with Kyte*, 944 S.W.2d at 33. However, Weaver testified that she actually found two baggies in the truck, one with a trace amount of substance in it and one that later tested positive for methamphetamine, in the amount of 1.35 grams. (RR7 – 167-168, 174-175). She could not recall which one she found where and could not recall whether she had to "dig around" in the vehicle to find it. (RR7 – 160, 167-68, 174-75). What was clear from the evidence was that the interior of the Ford truck was a mess of items scattered around the front cabin floorboards and seats; thus, anyone getting in the truck at night to drive down the road could have easily missed the small baggie's presence, as Connell did when he looked into the vehicle before Weaver, as it blended in with all the other junk piled up in the vehicle. (SX5 at 1:10-1:13; 5:10-5:25); (SX8 at 0:53-0:57); (SX40, 41).

Additionally, when the door to the Ford truck was opened by Connell and then again by Weaver on video, no interior light turned on. (SX5 at 0:32-0:34; 5:12-

5:20). Thus, Appellant getting into the messy Ford truck at night with the intention of driving would be in a much different position than Weaver, who was using a high-powered flashlight to specifically look at the contents of the vehicle. Accordingly, the State presented legally insufficient evidence at trial that Appellant intentionally or knowingly possessed the 1.35 grams of methamphetamine found in interior of the Ford truck, and Appellant respectfully requests that this Court so hold.

Furthermore, the only way the State could prove that Appellant possessed more than four ounces of a controlled substance, as alleged in the Indictment, was to prove beyond a reasonable doubt that Appellant also intentionally or knowingly possessed the larger baggie of methamphetamine, weighing 4.07 grams, that the police found on the parking lot pavement near the truck that Appellant was driving. (CR – 34, 109-114); (RR7 – 204); (SX11; SX12).

It was clear from the record that Appellant was not in exclusive possession of the ground of the parking lot. Therefore, applying the above fourteen potential links to the baggie of methamphetamine weighing 4.07 grams in the instant case, it is apparent that: there was no evidence presented that Appellant was under the influence of narcotics; Appellant did not make incriminating statements about the methamphetamine found on the ground; Appellant did not attempt to flee, but was cooperative; Appellant's fingerprints were not found on the baggie; Appellant was never seen holding, dropping, or throwing the baggie or any item that could be

construed as the baggie; Appellant did not make any furtive movements that were consistent with Appellant dropping or throwing any item; there was no odor of contraband; Appellant did not own or have a right to possess the parking lot where the baggie was found; the parking lot where the baggie was found was not enclosed; Appellant was not found in possession of large amounts of cash; and Appellant's conduct at the scene did not indicate any consciousness of guilt. (RR7 – 77-187); *Jones*, 963 S.W.2d at 830.

The instant case stands in contrast to *Gill v. State*, No. 06-11-00213-CR, 2012 WL 2127504 (Tex. App.—Texarkana June 13, 2012, no pet.) (mem. op., not designated for publication), where this Court upheld the defendant's conviction for Possession of a Controlled Substance over a challenge to the legal sufficiency of the evidence. *See Gill*, 2012 WL 2127504, at *2-3. In *Gill*, the defendant was standing by himself in the parking lot of an establishment; officers approached the defendant on foot and detected the odor of marijuana. *Id*. at *1. Officers observed the defendant drop something and put his hand up; near the defendant's feet, the officers discovered two baggies of cocaine and package of marihuana. *Id.* In holding that the evidence was legally sufficient to convict the defendant of possession of the cocaine, this Court cited, inter alia: the proximity of the drugs just "inches" from Gill's feet, in plain view; that Gill was standing in the area by himself and was seen making furtive movements in the area where the drugs were located; that Gill was in

possession of a large amount of cash; that Gill was in possession of paraphernalia; and that Gill made incriminating statements to the officers that he "sell[s] crack." *Gill*, 2012 WL 2127504, at *2-3.

Conversely, the only evidence that the State presented to link Appellant to the baggie of methamphetamine found on the ground in this case was testimony that the baggie was found near the vehicle that Appellant was driving, and that there was a baggie of methamphetamine found in the Ford truck. The State did not present evidence of any of the other affirmative links that this Court relied upon in *Gill* or in other cases to affirm a conviction in those instances. Hence, the evidence adduced at trial is legally insufficient to prove beyond a reasonable doubt that Appellant intentionally and knowingly possessed the 4.07 grams of methamphetamine found on the parking lot ground in the instant case, and Appellant respectfully requests that this Court so hold. Accordingly, because the State presented legally-insufficient evidence that Appellant possessed a controlled substance in the amount of four grams or more but less than 200 grams, no rational factfinder could have found Appellant guilty beyond a reasonable doubt of that offense, as charged in the Indictment. Thus, Appellant respectfully requests that this Court reverse Appellant's conviction and render a judgment of acquittal for the offense of Possession of a Controlled Substance in an amount of four grams or more but less than 200 grams, as charged in the Indictment. (CR – 34, 109-114).

If, however, this Court holds that the State adduced legally-sufficient evidence that Appellant intentionally and knowingly possessed the 1.35 grams of methamphetamine found in the Ford truck—but not the 4.07 grams of methamphetamine found on the parking lot ground—this Court should acquit appellant of the greater, charged offense, and may reform the judgment to reflect conviction of the lesser-included offense of Possession of Controlled Substance in an amount of one gram or greater but less than four grams. *See* TEX. HEALTH & SAFETY CODE ANN. § 481.115(a); TEX. HEALTH & SAFETY CODE ANN. § 481.115(c); TEX. HEALTH & SAFETY CODE ANN. § 481.115(d). A court of appeals has the authority to reform the judgment to reflect a conviction for a lesser-included offense when the evidence is insufficient to show that the defendant is guilty of the greater offense for which he was convicted. *Thornton v. State*, 425 S.W.3d 289, 299-300 (Tex. Crim. App. 2014). To determine if an appellate court can reform the judgment in such a manner, the court must ask two questions: (1) whether Possession of Controlled Substance, one gram or more but less than four grams was a lesser-included of charge in the instant case, and (2) whether there was sufficient evidence to support a conviction for the lesser-included offense. *Id.* If the answer to both of these questions is yes, then this Court has the authority to reform the judgment and convict Appellant in the instant case of the lesser-included offense. *See Thornton*, 425 S.W.3d at 299-300.

An offense qualifies as a lesser-included offense of the charged offense if: (1) it is established by proof of the same or less than all the facts required to establish the commission of the offense charged; (2) it differs from the offense charged only in that a less serious injury or risk of injury to the same person, property, or public interest suffices to establish the commission of the offense; (3) it differs from the offense charged only in that a less culpable mental state suffices to establish its commission; or (4) it consists of an attempt to commit the offense charged or an otherwise included offense. TEX. CODE CRIM. PROC. ANN. art. 37.09.

It is clear that Possession of a Controlled Substance, one gram or more but less than four grams is a lesser-included offense of Possession of a Controlled Substance, four grams or more but less than 200 grams, as it is established by proof of the same or less than all the facts required to establish the commission of the offense as charged in the Indictment—i.e. the total weight of the methamphetamine. Therefore, to the extent that this Court holds that there is legally-sufficient evidence to convict Appellant of Possession of a Controlled Substance amounting to one gram or more but less than four grams, Appellant respectfully requests that this Court acquit Appellant of the charge as plead in the Indictment, or in the alternative, acquit Appellant of the charged offense and reform the judgement to reflect a conviction for the third-degree felony of Possession of a Controlled Substance, one gram or

more but less than four grams, and remand this case to the trial court for a new hearing on punishment.

APPELLANT'S SECOND POINT OF ERROR

The Trial Court Reversibly Erred when it Overruled Appellant's Motion to Suppress the Evidence Pursuant to Article 38.23 of the Texas Code of Criminal Procedure as Appellant was Detained without Reasonable Suspicion and Arrested without Probable Cause in Violation of the Fourth Amendment of the United States Constitution and Article 1, Section 9 of the Texas Constitution

In this case, Appellant filed a motion to suppress: (1) contraband (i.e. the methamphetamine, inter alia) found at the scene of the alleged offense, (2) statements made by Appellant, (3) photographs and videos in any way connected to Appellant in this cause, (4) the testimony of law enforcement officers derived their observations at the scene from the illegal detention and arrest, and (5) "all fruits and instruments of the alleged offense." (CR – 60). The trial court held a suppression hearing, during which Appellant asked the trial court to suppress, inter alia, the above list of evidence pursuant to Article 38.23 of the Texas Code of Criminal Procedure as Connell and the other law enforcement officers at the scene in the instant case did not have reasonable suspicion to detain Appellant, nor probable cause to arrest Appellant, as is required by the Fourth Amendment of the United States Constitution and Article 1, Section 9 of the Texas Constitution. U.S. CONST. amend. IV; TEX. CONST. art. I, § 9; *Terry v. Ohio*, 392 U.S. 1 (1968); *Davis v. State*,

829 S.W.2d 218 (Tex. Crim. App.1992). At the end of the hearing, the trial court denied Appellant's motion to suppress. (CR – 60, 80, 105); (RR7 – 6-63).

Appellate courts review a trial court's decision to deny a motion to suppress evidence by applying a bifurcated standard of review. *Young v. State*, 420 S.W.3d 139, 141 (Tex. App.—Texarkana 2012, no pet.); *Rogers v. State*, 291 S.W.3d 148, 151 (Tex. App.—Texarkana 2009, pet. ref'd). Because the trial court is the exclusive trier of fact and judge of witness credibility at a suppression hearing, Appellate courts are to afford almost total deference to the trial court's determinations of facts which are supported by the record. *Carmouche v. State*, 10 S.W.3d 323, 327 (Tex. Crim. App. 2000); *Guzman v. State*, 955 S.W.2d 85, 89 (Tex. Crim. App. 1997). Appellate courts also afford such deference to a trial court's ruling on the application of law to fact questions, also known as mixed questions of law and fact, if the resolution of those questions turns on an evaluation of credibility and demeanor. *Villarreal v. State*, 935 S.W.2d 134, 138 (Tex. Crim. App. 1996). However, appellate courts apply a *de novo* review to the trial court's application of the law and its determination of questions which do not turn on credibility assessments. *Carmouche*, 10 S.W.3d at 332; *Guzman*, 955 S.W.2d at 89; *Graves v. State*, 307 S.W.3d 483, 489 (Tex. App.—Texarkana 2010, pet. ref'd). Thus, an appellate court reviews *de novo* the lower court's application of the relevant Fourth Amendment standards. *Guzman*, 955 S.W.2d at 89.

In determining whether a trial court's decision is supported by the record, appellate courts generally consider only evidence adduced at the suppression hearing, because the ruling was based on that evidence, rather than evidence introduced later at trial. *Rachal v. State*, 917 S.W.2d 799, 809 (Tex. Crim. App. 1996). If the trial court did not make explicit findings, as in the instant case, appellate courts review the evidence in a light most favorable to the trial court's ruling. *State v. Ballard*, 987 S.W.2d 889 (Tex. Crim. App. 1999); *State v. Munoz*, 991 S.W.2d 818, 821 (Tex. Crim. App. 1999).

A police officer may lawfully stop a motorist who has committed a traffic violation. *Garcia v. State*, 827 S.W.2d 937, 944 (Tex. Crim. App. 1992). A traffic stop is a detention, and therefore must be reasonable under both the United States and Texas Constitutions. *See* U.S. CONST. amend. IV; TEX. CONST. art. I, § 9; *Terry*, 392 U.S. at 16; *Davis*, 947 S.W.2d at 245. When a police officer stops a defendant without a warrant and without the defendant's consent, the State has the burden of proving the reasonableness of the stop at a suppression hearing. *Russell v. State*, 717 S.W.2d 7, 9-10 (Tex. Crim. App. 1986); *Hernandez v. State*, 983 S.W.2d 867, 869 (Tex. App.—Austin 1998, pet. ref'd). As a general matter, a stop is reasonable when a police officer has probable cause to believe that a traffic violation has occurred, or reasonable suspicion that a crime is occurring. *Whren v. United States*, 517 U.S. 806, 810 (1996); *Walter v. State*, 28 S.W.3d 538, 542 (Tex. Crim. App. 2000).

Though the State is not required to prove that an individual actually committed a traffic violation, the State is required to prove that the officer's stop was based on a reasonable belief that a violation was in progress. *Tex. Dep't of Pub. Safety v. Fisher*, 56 S.W.3d 159, 163 (Tex. App.—Dallas 2001, no pet.); *Green v. State*, 93 S.W.3d 541, 544 (Tex. App.—Texarkana 2002, pet. ref'd).

At Appellant's suppression hearing, Connell testified that he was on patrol on April 1, 2017, at approximately 10:45 PM and initiated a traffic stop on Appellant, a detention, because he believed the Ford truck that Appellant was driving was not exhibiting a rear license plate. (RR7 – 9, 37, 39, 40-42, 47); (SPretrialX1 – 0:01 – 1:55); *see generally* TEX. TRANSP. CODE ANN. § 504.943; 43 TEX. ADMIN. CODE § 217.27(b)(1). The State attempted elicit testimony from Connell that he also had reasonable suspicion or probable cause to stop Appellant because there was no white light illuminating the license plate as required by Transportation Code Section 504.943. (RR7 – 18-19; 21-22); *see generally* TEX. TRANSP. CODE ANN. § 504.943. However, Connell repeatedly testified that he could not "recall" whether there was a white light illuminating the license plate, and the reason that he initiated the stop was that "[he] did not see the license plate at all." (RR7 – 21, 37-38, 41, 47); (SpretrialX1 at 0:20-1:40).

It is clear from State's Pretrial Exhibit 1, Connell's dash-cam video, that Connell had no legal justification for a traffic stop of Appellant. The video plainly

shows that Appellant's Ford truck displayed a rear license plate under the driver-side tail lamp, and that there was a white light illuminating the license plate. SX1. In particular, the license plate and the white light illuminating the license plate are especially visible in the video at 0:27-36, when the blinker was activated and the Ford truck made a U-turn, and again at 1:52-2:00, when the truck turned left into the Sirloin Stockade parking lot. (RR7 – 21, 37-38, 41, 47); (SPretrialX1 at 0:20-2:00). Hence, it was uncontested at the hearing that Connell was wrong and that the Ford truck was exhibiting a license plate in the rear of the vehicle, as well as properly illuminating the license plate. (RR7 – 22); (SPretrialX1 at 0:20-2:00).

As stated above, the State was not required to prove that Appellant actually committed a traffic violation, but the State was required to prove that the officer's stop was based on a reasonable belief that a violation was in progress. *See Fisher*, 56 S.W.3d at 163; *Green*, 93 S.W.3d at 544. Here, Connell's belief that the Ford truck was not exhibiting a license plate was simply not reasonable given the facts of the instant case. Connell did not testify about any conditions that made it difficult for him to see the license plate, nor did he testify about weather conditions, speed, angle, or any other factor or obstruction that might reasonably explain why he would not see the license plate. Connell's explanation was simply not believable, and was certainly not reasonable, given the uncontested facts at the motion to suppress hearing and, especially in light of State's Exhibit 1, Connell's dash-cam video.

Thus, Connell did not have reasonable suspicion or probable cause to initiate a traffic stop on the Ford truck, as is required by the Fourth Amendment of the United States Constitution and Article 1, Section 9 of the Texas Constitution. *See* U.S. CONST. amend. IV; TEX. CONST. art. I, § 9. Pursuant to Article 38.23, then, the trial court should have granted Appellant's request to suppress the methamphetamine and other evidence requested that the police discovered after the illegal traffic stop. *See* TEX. CODE CRIM. PROC. ANN. art. 38.23(a) ("No evidence obtained by an officer or other person in violation of any provisions of the Constitution or laws of the State of Texas, or of the Constitution or laws of the United States of America, shall be admitted in evidence against the accused on the trial of any criminal case."). And if the trial court had properly suppressed said evidence, the State would have been unable to prove beyond a reasonable doubt that Appellant committed the instant offense. Thus, Appellant respectfully requests that this Court vacate the jury trial conviction in the instant case and remand the case to the trial court for a new trial consistent with this Court's holding.

Additionally, the trial court erred in not granting Appellant's motion to suppress because Connell and the other law enforcement officers on the scene in the instant case arrested Appellant without probable cause, in violation of the Fourth Amendment of the United States Constitution and Article 1, Section 9 of the Texas Constitution. *See* U.S. CONST. amend. IV; TEX. CONST. art. I, § 9; *Amores v. State*,

816 S.W.2d 407, 412 (Tex. Crim. App. 1991); *see also Rhodes v. State*, 945 S.W.2d 115, 118 (Tex. Crim. App. 1997); (CR – 60-61, 105-108); (RR7 – 6-63). In the instant case, Connell admitted that the area where the traffic stop occurred was not a high-crime area. (RR7 – 48). Connell also admitted that, at the time of the arrest, Appellant was not breaking any other traffic or criminal laws; rather, Connell was stopping Appellant because he believed that the Ford truck was not exhibiting a license plate. (RR7 – 9, 17, 22, 37). Connell admitted that Appellant did not evade him, was not speeding, was not changing lanes without signaling, and was not throwing anything out the window. (RR7 – 39, 40-41, 48, 52-53). On State's Pretrial Exhibit 1, Connell initiated the traffic stop with his emergency lights at 0:49; Appellant drove slowly, obviously trying to determine if the emergency lights were meant for him; approximately 27 seconds later, at 1:16, Connell sounds his siren and Appellant turns cautiously into of one of the first three available side-exits off the feeder-road, which does not have a large shoulder. (SpretrialX1 – 0:49-1:42). Appellant then made an immediate turn into the first entrance available, which was into the parking lot of the Sirloin Stockade, and came to a stop. (SpretrialX1 – 1:42 – 2:10). Connell did not then get out and investigate whether the truck was exhibiting a license plate; instead, Connell immediately got out of his vehicle with his firearm pointed at Appellant and he, along with Officer Spradlin, who also had his firearm pointed at Appellant, proceeded to approach Appellant, yelling

instructions at him. (SpretrialX1 – 2:15-2:18); SpretrialX4 – 0:01-1:20); (SpretrialX5 – 0:01-0:50).

Within a minute and twenty seconds of Appellant pulling to a stop, Appellant was on his knees and handcuffed at gunpoint, all for an alleged license-plate violation. (SpretrialX4 – 0:01-1:20). Approaching Appellant, Connell yelled for Appellant to stay in the truck, place his hands on his face, then exit the truck, get down on the ground on his knees, and had other officers handcuff Appellant. (SpretrialX4 – 0:01-1:20). Again, all of this occurred while Connell and Officer Spradlin had their guns pointing directly at Appellant, and despite that Appellant cooperated the entire time. (SpretrialX4 – 0:01-1:20). Though Connell testified at the suppression hearing that Appellant was simply being detained at the time he was handcuffed, the facts of the instant case make it clear that the Connell initiated a custodial arrest without probable cause, in violation of the Fourth Amendment of the United States Constitution and Article 1, Section 9 of the Texas Constitution. *See* U.S. CONST. amend. IV; TEX. CONST. art. I, § 9; *Amores,* 816 S.W.2d at 412; (RR7 – 31-32).

In *Amores,* the owner of an apartment observed the defendant, who was not a tenant of the apartments, unloading some boxes out of a "junk car" and moving them into another vehicle, which was parked against apartment rules; the owner called 911 to report a possible burglary in progress. *Amores,* 816 S.W.2d at 409-10.

Officer Henry was patrolling a few blocks away and received the dispatch call; when he arrived, he observed the defendant pulling out of the parking area. *Id*. at 410. Officer Henry blocked the defendant's vehicle with his patrol car, ordered the defendant out of the vehicle at gunpoint, commanded that the defendant get down onto the ground, threatened the defendant, and handcuffed the defendant at gunpoint. *Id*. Guns and drugs were eventually found in the defendant's vehicle. *Id*. At a suppression, Officer Henry testified that he believed he was conducting an investigative detention of the defendant and not an arrest. *Id*. The Court of Criminal Appeals disagreed, though, and reversed the defendant's conviction, stating "we find that the initial detention in this case was in fact an arrest…These facts are sufficient to demonstrate that [the defendant] had been restricted or restrained in his liberty to such a degree as to constitute an arrest." *Amores*, 816 S.W.2d at 411-12.

In the instant case, Connell approached Appellant with multiple other officers and while he and another officer continuously pointed their guns directly at Appellant at close range. (SpretrialX4 – 0:01-1:20); (SpretrialX5 – 0:01-0:50). Connell repeatedly yelled at Appellant; forced Appellant to put his hands on the steering wheel, and then on his face; and then commanded Appellant to get out of the vehicle and get onto his knees at gunpoint. (SpretrialX4 – 0:01-1:20); (SpretrialX5 – 0:01-0:50). Appellant was then immediately handcuffed—all before any "investigation" occurred. (SpretrialX4 – 0:01-1:20); (SpretrialX5 – 0:01-0:50).

Connell did not then go investigate the license plate issue but proceeded to request to search Appellant; Connell did not testify as to what evidence of a license plate violation he expected to find in Appellant's pocket. (SpretrialX4 – 0:01-2:00); (SpretrialX5 – 0:01-0:50). Though Connell did not verbally threaten Appellant with harm, like Officer Henry did in *Amores*, Officer Henry was investigating a potential burglary in progress, while Connell was supposed to be investigating merely a potential violation of the law requiring the display of a rear license plate. *Amore*s, 816 S.W.2d at 409-12.

It is clear from the record that Connell restrained Appellant's freedom to the extent associated with custodial arrest; more importantly, Connell did so without probable cause that Appellant committed a crime. Therefore, the trial court also erred in not granting Appellant's motion to suppress the above-listed evidence, including the methamphetamine and guns, pursuant to Article 38.23 of the Texas Code of Criminal Procedure on the basis that Connell, with the assistance of other law enforcement, initiated a custodial arrest of Appellant without probable cause, in violation of the Fourth Amendment of the United States Constitution and Article 1, Section 9 of the Texas Constitution. *See* U.S. CONST. amend. IV; TEX. CONST. art. I, § 9; *Amores*, 816 S.W.2d at 412. Thus, Appellant respectfully requests that this Court vacate the jury trial conviction in the instant case and remand the case back to the trial court for a new trial consistent with the holding of this Court.

APPELLANT'S THIRD POINT OF ERROR

The Trial Court Reversibly Erred when it Denied Appellant's Request for a Guilt-Phase Jury Instruction Pursuant to Article 38.23 of the Texas Code of Criminal Procedure, and Appellant Suffered Some Harm as a Result of Said Error.

In the instant case, Connell testified that he initiated a traffic stop of Appellant, a detention, because he believed the Ford truck Appellant was driving was not exhibiting a rear license plate; this was the sole reason for the traffic stop. (RR7 – 82-83, 145); *see* TEX. TRANSP. CODE ANN. § 504.943 ("Operation of Vehicle Without License Plate"); 43 TEX. ADMIN. CODE § 217.27(b)(1). But, as discussed above, it was uncontested at trial that Connell was incorrect, and that the Ford truck was displaying a rear license plate, which was clearly visible under the back left taillight. (RR7 – 140); (SX 3 at 0:20-2:08).

At the charge conference in the guilt/innocence phase of trial, Appellant requested a jury instruction under Article 38.23, which would ask the jury to determine whether Connell had reasonable suspicion to detain Appellant based on his belief that the Ford truck was being operated without exhibiting a license plate in violation of Section 504.943 of the Texas Transportation Code. (CR – 117-118); (RR7– 211; RR8 – 9, 16-19); *see* TEX. CODE CRIM. PROC. ANN. art. 38.23(a) ("In any case where the legal evidence raises an issue hereunder, the jury shall be instructed that if it believes, or has a reasonable doubt, that the evidence was obtained in violation of the provisions of this Article, then and in such event, the jury

shall disregard any such evidence so obtained."). The trial court denied Appellant's request for said jury instruction. (RR8 – 16-17). In doing so, the trial court erred, and Appellant suffered some harm as a result. Thus, this Court should vacate the verdict of guilty in the instant case and remand the case back for a new trial on both stages.

Under Article 38.23(a) of the Texas Code of Criminal Procedure, "[n]o evidence obtained by an officer...in violation of any provisions of the Constitution or laws...shall be admitted in evidence against the accused" at trial. *Robinson v. State*, 377 S.W.3d 712, 719 (Tex. Crim. App. 2012) (quoting TEX. CODE CRIM. PROC. ANN. art. 38.23(a)). When evidence presented before the jury raises a question of whether the fruits of a police-initiated, detention or arrest were illegally obtained, "the jury shall be instructed that if it believes, or has a reasonable doubt, that the evidence was obtained in violation of the provisions of this Article, then and in such event, the jury shall disregard any such evidence so obtained." TEX. CODE CRIM. PROC. ANN. art. 38.23(a).

Texas courts require reasonable suspicion before a seizure of the person or property can occur. *Davis v. State*, 947 S.W.2d 240, 244 (Tex. Crim. App. 1997); *Carmouche*, 10 S.W.3d 323; *Davis*, 829 S.W.2d 218. Further, both the United States and Texas Constitutions require a routine traffic stop to be based on reasonable suspicion or probable cause. *Berkemer v. McCarty*, 468 U.S. 420 (1984); *Earl v.*

State, 362 S.W.3d 801, 802 n.2 (Tex. App.—Texarkana 2012, pet. ref'd). To conduct a constitutionally-valid traffic stop, an officer must have a reasonable suspicion based on specific, articulable facts that, when combined with rational inferences from those facts, would lead the officer to reasonably suspect that the person stopped has engaged or is or soon will be engaging in criminal activity. *Hamal v. State*, 390 S.W.3d 302, 306 (Tex. Crim. App. 2012); *Zervos v. State*, 15 S.W.3d 146, 151 (Tex. App.—Texarkana 2000, pet. ref'd).

If a fact issue has been raised about whether a traffic stop violated the Constitution or laws of either the United States or Texas, the trial court should submit a jury instruction to disregard evidence the jury finds was obtained in violation the Constitution or laws of the United States or Texas. *See* TEX. CODE CRIM. PROC. ANN. art. 38.23(a); *Hamal*, 390 S.W.3d at 306. An instruction pursuant to Article 38.23 is mandatory when there is a factual dispute regarding the legality of detention, arrest, or search. *Pickens v. State*, 165 S.W.3d 675, 680 (Tex. Crim. App. 2005); *Brooks v. State*, 642 S.W.2d 791, 799 (Tex. Crim. App. 1982); *Malone v. State*, 163 S.W.3d 785, 802 (Tex. App.—Texarkana 2005, pet. ref'd). To be entitled to the submission of a jury instruction under Article 38.23(a), a defendant must establish that: (1) the evidence heard by the jury raised an issue of disputed fact; (2) the evidence on that fact is contested; and (3) the contested factual issue is be material to the lawfulness of the challenged conduct in obtaining the evidence. *Madden v.*

State, 242 S.W.3d 504, 510 (Tex. Crim. App. 2007). Evidence to justify an Article 38.23(a) instruction can derive from any source, no matter whether it is strong, weak, contradicted, unimpeached, or unbelievable; but it must raise a "factual dispute about how the evidence was obtained." *Robinson*, 377 S.W.3d at 719.

Here, after following behind the black Ford that Appellant was driving for almost a minute, at low speeds, and through two turns, Connell initiated a traffic-stop detention of Appellant by activating Connell's overhead emergency lights and siren. (SX3 – 0:47; 1:14). In response to Connell initiating the traffic-stop detention, Appellant pulled over his vehicle, coming to a stop in the Sirloin Stockade parking lot. (RR7 – 89). There was no doubt that the Ford truck that Appellant was driving was exhibiting a rear license plate just below the back, diver's side brake light, given that Connell's dash-cam video, as well as other body-cam videos, clearly show that there was a license plate properly exhibited. (RR7 – 140); (SX3 at 0:29-0:34; 1:51-2:08). Therefore, there was evidence admitted at trial that demonstrates that Connell was wrong, and that he did not have reasonable suspicion or probable cause initiate a traffic-stop detention of Appellant.

In *Madden*, the detaining Trooper testified that he initiated a traffic stop of the defendant for speeding at 61 m.p.h. in a 55 m.p.h. zone; though defendant did not testify at trial, on the patrol video, the defendant stated that he was going 55 m.p.h. *Madden*, 242 S.W.3d at 506. A subsequent search of the vehicle uncovered illegal

drugs in the truck. *Id*. at 506-07. In agreeing with the trial court's duty to give an Article 38.23 instruction under such circumstances, the Court of Criminal Appeals stated:

> [The Trooper] reasonably believed that [Madden] was speeding at the time he stopped [Madden's] car. [The trial court] gave that instruction because she heard [Madden] say, on [the] patrol-car video recording, that he was driving 55 m.p.h., while [the Trooper] testified that appellant was driving 61 m.p.h. Thus, [Madden's] speed was a contested fact. If [the Trooper] did not reasonably believe that [Madden] was going faster then 55 m.p.h., then, under the Fourth Amendment, he should not have stopped [Madden], and all evidence obtained as a result of that stop would be inadmissible. The trial judge's instruction correctly submitted that factual issue for the jury to decide, along with an explanation of the pertinent law. *Madden*, 242 S.W.3d at 511.

Similarly, in the instant case, Connell's dash-cam video admitted into evidence provided clear evidence that the Ford truck Appellant was driving did exhibit at license plate, in contrast to the testimony of Connell; though the license plate on the Ford truck located under the back, driver's side taillight can be seen throughout said video, it is particularly clear and visible when the Ford truck turns and the taillight blinks off and on. (SX3 at 0:29-0:34; 1:51-2:08). Incidentally, though Connell did not initiate a traffic stop detention of Appellant because of any lack of a white light illuminating the license plate, said white light can be seem shining on the license plate of the Ford truck on the same turns mentioned above. (SX3 at 0:29-0:34; 1:51-2:08); *see generally* TEX. TRANSP. CODE ANN. § 504.943.

The State may argue that, though Connell was wrong about whether the Ford truck was exhibiting a license plate, he was reasonably mistaken about the issue, and therefore Connell still had reasonable suspicion to believe that the Ford truck was not exhibiting a license plate. *See Robinson*, 377 S.W.3d 712. However, just like in *Madden*, there was evidence presented at trial that Connell did not reasonably believe that Appellant was operating a vehicle without exhibiting a license plate, and the jury could have found either that Connell was lying or that he was not reasonable in his belief that the Ford truck was traveling without a license plate. Therefore, an Article 38.23 jury instruction was warranted, and the trial court clearly erred in denying Appellant's request for such.

Appellate courts review claims regarding jury-charge errors under a two-pronged test. *Swearingen v. State*, 270 S.W.3d 804, 808 (Tex. App.—Austin 2008, pet. ref'd). Under the first prong, the reviewing court determines "whether error exists"; under the second prong, if error exists, the reviewing evaluates the harm caused by the error. *Ngo v. State*, 175 S.W.3d 738, 743 (Tex. Crim. App. 2005). The amount of harm needed for a reversal depends on whether a complaint regarding "that error was preserved in the trial court." *Swearingen*, 270 S.W.3d at 808. If the defendant made a timely request or objection, reversal is required if there has been "some harm" to the defendant from the omission of the desired instruction. *Almanza v. State*, 686 S.W.2d 157, 171 (Tex. Crim. App. 1985). However, if no request or

objection was made, a reversal is warranted only if the error resulted in "egregious harm." *Neal v. State,* 256 S.W.3d 264, 278 (Tex. Crim. App. 2008). At the charging conference, Appellant requested and was denied the Article 38.23 instruction; therefore, this Court should use the "some harm" standard for its harm analysis. (RR8 – 9, 16-19; CR – 117-118); *see Almanza*, 686 S.W.2d at 171.

Appellant clearly suffered some harm by the trial court not granting the Article 38.23 instruction. The entire State's case was that Appellant possessed methamphetamine found in and around the Ford truck that were discovered after Appellant pulled over for a traffic stop by Connell. (RR8 – 27-32). Therefore, under the State's theory of the case, Connell would not have discovered any of the methamphetamine had he not initiated a traffic-stop detention of the Ford truck that Appellant was driving. Therefore, all the methamphetamine found at the scene of the traffic stop in the instant case would be evidence that the jury would have been forced to disregard, under Article 38.23, had they found that Appellant's detention was in violation of the Fourth Amendment of the United States Constitution and/or Article 1, Section 9 of the Texas Constitution. Thus, Appellant clearly suffered some harm as the result of the trial court's error in not granting Appellant's request for an Article 38.23 jury instruction. Accordingly, Appellant respectfully requests that this Court vacate Appellant's conviction and remand this case back to the trial court for a new trial on both stages.

APPELLANT'S FOURHT POINT OF ERROR

Appellant's Sentence of Twenty Years' Confinement in TDCJ is in Violation of the Prohibitions against Cruel and Unusual Punishment in the Eighth Amendment to the United States Constitution and Article 1, Section 13 of the Texas Constitution

Appellant's sentence to twenty years' confinement in TDCJ violates the prohibitions against cruel and unusual punishment in the Eighth of Amendment of the United States Constitution and Article 1, Section 13 of the Texas Constitution. (CR – 126); *see generally* U.S. CONST. amend. VIII; TEX. CONST. art. I, § 13.

Generally, a sentence within the statutory range of punishment for an offense will not be considered cruel or unusual under either the United States or Texas Constitution. *Harris v. State*, 656 S.W.2d 481, 486 (Tex. Crim. App. 1983); *Hill v. State*, 493 S.W.2d 847, 849 (Tex. Crim. App. 1973). Further, the United States Supreme Court has stated that "[r]eviewing courts...should grant substantial deference to the broad authority that legislatures necessarily possess in determining the types and limits of punishments for crimes, as well as to the discretion that trial courts possess in sentencing convicted criminals." *Solem v. Helm*, 463 U.S. 277, 290 (1983). However, the *Helm* Court also held that criminal sentences must be proportionate to the crime, and that even a sentence within the statutorily prescribed range may violate the Eighth Amendment. *Helm*, 463 U.S. at 290. The *Helm* Court then set forth three objective criteria by which reviewing courts should analyze sentence-proportionality claims: (1) the gravity of the offense and the harshness of

the penalty; (2) the sentences imposed on other criminals in the same jurisdiction; and (3) the sentences imposed for commission of the same crime in other jurisdictions." *Id*. at 290-92.

Texas courts make a threshold comparison of the offense against the severity of the sentence, judging the gravity of the offense in light of the harm caused or threatened to the victim or society and the culpability of the offender. *See Culton v. State*, 95 S.W.3d 401, 403 (Tex. App.—Houston [1st Dist.] 2002, pet. ref'd); *Moore v. State*, 54 S.W.3d 529, 542 (Tex. App.—Fort Worth 2001, pet. ref'd). Only upon determining that the sentence was grossly disproportionate to the offense do the courts then consider the other two factors. *Id.*

In the instant case, the range of punishment for the underlying offense was confinement in TDCJ for not more than 20 years, nor less than 2 years, and up to a $10,000 fine. *See* TEX. PENAL CODE ANN. § 12.33; TEX. HEALTH & SAFETY CODE ANN. § 481.115. Appellant timely objected to his twenty-year prison sentence as being in violation of the Eighth of Amendment of the United States Constitution and Article 1, Section 13 of the Texas Constitution. (CR – 142-148); (RR11).

Though Appellant's twenty-year prison sentence was within the statutory range of punishment for the charged offense, the sentence was nevertheless grossly disproportionate to the offense committed in light of the specific facts of the case. It was uncontested at trial that:

- Appellant has no prior convictions or deferred adjudications;
- Appellant had previously served his country as a law enforcement officer, and as then as contractor overseas in Iraq;
- The underlying offense involved the mere possession of drugs, with few aggravating factors, if any, present—i.e. there was no evidence adduced at trial of drug-dealing, of kids being present or exposed to the drugs, or that Appellant intoxicated on drugs while driving;
- During the investigation Appellant was cooperative and compliant with officers;
- The amount of drugs recovered at the scene was at the lower range of weight for a second-degree felony, 4 grams or more but less than 200 grams.
- Appellant suffers from physical and mental-health issues, and admitted to many years of struggle with opioids;
- Appellant spent over a year in the Williamson County Jail before trial and, while in jail, consistently participated in AA meetings and church services;
- Appellant showed remorse at the punishment phase of trial, and was open with the jury about his struggle with drug addiction and how it has effected himself and the people around him. (RR10 – 10-11, 15-26, 24-35, 48-49, 50, 52); (SX11-12).

All of these facts, along with the record as a whole, weigh in favor of leniency in the instant case. In contrast, the offense as committed did not justify the twenty-year sentence imposed by the jury. A mere drug-possession case committed by Appellant, in contrast to the mitigating factors listed above, evinces that the jury sentence of twenty years' confinement—the maximum allowed by law—was grossly disproportionate to the offense committed.

Appellant's sentence is also greater than those imposed on defendants in the same jurisdiction, as well as in other jurisdictions, for the same offense. Over the past ten years, in Williamson County, Texas, no defendant who was not 25-life due to being a habitual offender (had two or more prior final felony convictions) has ever received a twenty-year sentence for Possession of a Controlled Substance, four grams or more but less than 200 grams. (RR11 – 47-57); (DXMNT 4-6). In fact, there was only one defendant in the last ten years in Williamson County that received a sentence equal to or greater than Appellant's sentence, and that defendant was both a habitual offender, 25-life, and had 19 prior arrests. (RR11 – 47-57); (DXMNT 4-6). Thus, Appellant's sentence was grossly disproportionate to the offense committed, when compared the sentences given to other defendants found guilty of the same offense in the same jurisdiction.

Appellant's sentence is also greater than punishments imposed on defendants in other jurisdictions for the same crime. For example, in *Jones v. State*, the

defendant was the target of an undercover investigation as there was evidence he was selling drugs out of his house; after a search warrant was obtained and executed for the defendant's house, over 4 grams of cocaine were found. *Jones v. State*, 963 S.W.2d 826, 828 (Tex. App.—Texarkana 1998, pet. ref'd). After the jury returned a verdict of *guilty*, Jones was sentenced to twelve years in TDCJ. *Jones*, 963 S.W.2d at 827. Similarly, in *Cox v. State*, the defendant was charged with the first-degree felony offense of Possession of Controlled Substance, 200 or more grams and less than 400 grams; despite the defendant being found in possession of 243 grams of illegal drugs, and having two prior criminal convictions including a revocation of a previous probation, the trial court sentenced Cox to eight years in TDCJ. *Cox v. State*, No. 06-11-00228-CR, 2012 WL 2053317, at *1 (Tex. App.—Texarkana June 8, 2012, no pet.) (mem. op., not designated for publication). And in *Gouldsby v. State*, Gouldsby was convicted of Possession of Controlled Substance, four or more grams and less than 200 grams and a second count of Possession of Controlled Substance, four or more grams and less than 400 grams and received twelve years' confinement in TDCJ as punishment. *Gouldsby v. State*, 202 S.W.3d 329, 335 (Tex. App.—Texarkana 2006, pet. ref'd).

In fact, the undersigned counsel has not been able to locate any case in any jurisdiction where a defendant has received twenty years in TDCJ on a second-

degree Possession of Controlled Substance charge when said defendant had no previous convictions or deferred adjudications.

The State may argue that the jury was not grossly disproportionate because the jury heard evidence during the punishment phase of trial of Appellant participating in a burglary and other acts that the jury could have used to punish Appellant. The central effort by the State in the punishment phase was to prove up an alleged burglary of a residence that allegedly occurred in the days before the arrest in the instant case. However, the co-defendant in the alleged burglary was Matthew Kubasta ("Kubasta"), who testified against Appellant during the punishment phase in the instant case; Kubasta received only six years' confinement in TDCJ for the second-degree felony of Burglary of a Habitation, despite Kubasta having numerous felony and misdemeanor convictions and arrests before and after the date of the Burglary. (RR9 – 57-60, 107, 117-118). In contrast, Appellant was never convicted of any burglary and is serving a twenty-year sentence for a mere drug-possession charge, his first criminal conviction.

Because Appellant punishment was grossly disproportionate to the offense committed, as well to the sentences given to defendants charged with the same offense in the same and other jurisdictions, the jury twenty-year prison sentence violates the prohibitions against cruel and unusual punishment in the Eighth Amendment to the United States Constitution and Article 1, Section 13 of the Texas

Constitution. And since Appellant's twenty year sentence is unconstitutional, Appellant respectfully requests that this Court vacate the trial court's sentence and remand the case back to the trial court for a new trial on punishment.

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CONCLUSION AND PRAYER

For the foregoing reasons, Appellant respectfully submits that the evidence is legally insufficient to enable any rational factfinder to conclude beyond a reasonable doubt that Appellant is guilty of Possession of Controlled Substance. Therefore, this Court should reverse Appellant's conviction and render a judgment of acquittal, or in the alternative, reform the judgement to reflect a conviction for a lesser-included offense of Possession of Controlled Substance, in an amount weighing one gram or more but less than four grams, and remand the case back to the trial court for a new trial on punishment. Appellant also submits that the trial court reversibly erred when it overruled Appellant's motion to suppress evidence pursuant to Article 38.23 of the Texas Code of Criminal Procedure, given that Appellant was detained without reasonable suspicion and arrested without probable cause, in violation of the Fourth Amendment of the United States Constitution and Article 1, Section 9 of the Texas Constitution. Therefore, this Court should vacate Appellant's conviction and remand the case back to the trial court for a new trial on all stages. Next, Appellant submits that the trial court reversibly, harmfully erred in

denying Appellant's request for an Article 38.23 jury instruction and, thus, this court should reverse the trial court's judgment and remand the case for a new trial in all respects. Finally, Appellant submits that Appellant's twenty-year sentence violates the prohibitions against cruel and unusual punishment in the Eighth Amendment to the United States Constitution and Article 1, Section 13 of the Texas Constitution and, thus, this should Court vacate the trial court's sentence and remand the case back to the trial court for a new trial on punishment.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Texas Rule of Appellate Procedure 9.4(i), the undersigned attorney certifies that there are 9,983 words in the foregoing computer-generated document, based upon the representation provided by Microsoft Word, the word processing program that was used to create the document, and excluding the portions of the document exempted by Rule 9.4(i)(1).

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CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing instrument has been served upon Rene Gonzalez, attorney of record on appeal for The State of Texas, on November 9, 2018, at the following e-mail address, through the electronic service system provided by eFile.TXCourts.gov:

Rene.gonzalez@wilco.org

/s/ Kevin Stryker

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